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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRY LEON JOYNER,
Petitioner,

v.

MANLY LANCASTER AND COUNTY OF FORSYTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether a public employee bringing an action under 42 U.S.C. §1983 for violation of his First Amendment rights has a right to have factual issues underlying the balancing test established in Pickering v. Board of Education, 391 U.S. 563 (1968), determined by a jury.

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Harry Leon Joyner respectfully petitions for a writ of certiorari to review the Judgment of the United States Court of Appeals for the Fourth Circuit in this case entered on March 26, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 815 F.2d 20 and is printed herein as Appendix A (App. p.1). The Opinion and Order of the District Court is unreported, and is printed herein as Appendix B (App. p.20).

JURISDICTION

The Judgment of the Court of Appeals was entered on March 26, 1987. This Court has jurisdiction to review the Judgment of the Court of Appeals by certiorari, pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment I, provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution, Amendment VII, provides that:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

42 U.S.C. §1983 provides that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In this action, Harry Leon Joyner, a Captain in the Forsyth County Sheriff's Department, alleged that defendant Sheriff Manly Lancaster discharged him on July 7, 1982, in violation of his rights under the First and Fourteenth

Amendments to the United States Constitution. Specifically, the plaintiff contended that he was fired because he openly campaigned on behalf of defendant Lancaster's opponent in the Democratic primary election for Sheriff held on June 29, 1982, and that this campaign activity on his part was constitutionally protected. In his Complaint the plaintiff sought reinstatement to his position with back pay and attorney's fees. The plaintiff also demanded a trial by jury. This action was brought pursuant to 42 U.S.C. §1983, and the District Court's jurisdiction was founded on 28 U.S.C. §§1331 and 1343.

The case was called for a jury trial before the Honorable Hiram H. Ward,

United States District Judge for the Middle District of North Carolina, on November 4, 1985. At the close of the evidence, the District Court declared that there were factual issues to be resolved before the Court could engage in the balancing process mandated by Pickering v. Board of Education, 391 U.S. 563 (1968), in order to determine whether the plaintiff's speech activity was constitutionally protected. The Court then submitted the following issue to the jury:

> Did Sheriff Lancaster reasonably believe that the plaintiff's campaign activities could affect the morale, efficiency, discipline or administration of the Forsyth County Sheriff's Department?

The jury answered this issue "No".

Following this verdict, the District Court decided that Connick v. Myers, 461 U.S. 138 (1983), mandated that the entire balancing process, including the resolution of any disputed issues of fact, was a matter of law for the Court, and characterized the jury's action as an "advisory verdict." The Trial Court then entered an Order finding that the defendants' interest in the efficient operation of the Forsyth County Sheriff's Department outweighed the plaintiff's interest in expressing his political views. The Court therefore concluded that the plaintiff's campaign activities were not constitutionally protected and dismissed this action.

The United States Court of Appeals for the Fourth Circuit affirmed the Trial Court's decision. In so doing, the Court of Appeals, overruling precedent, held that, pursuant to Connick, the entire Pickering balancing test, including the determination of any disputed issues of fact, was a matter of law for the Court and that the jury had no role to play.

The Facts

The evidence introduced at the trial of this action established the following facts:

The plaintiff was appointed as a Deputy Sheriff by defendant Lancaster's predecessor in office on or about May 1, 1962. The plaintiff received several

promotions during the course of his service with the department, culminating in his promotion to the rank of Captain in the Patrol Division, in 1974 by defendant Lancaster.

Defendant Lancaster began employment as a deputy in 1950 and was elected Sheriff on the Democratic Party ticket in 1970. He was re-elected as Sheriff in 1974, 1978 and 1982.

As a Captain in the Patrol Division, the plaintiff was responsible for the supervision of approximately fifteen (15) deputies who patrolled the County during an eight-hour shift. The plaintiff reported directly to Major G. R. Dillon and dealt primarily with Major Dillon concerning departmental operations, policies and personnel matters.

Sheriff Lancaster and Major Dillon were responsible for the formulation of departmental policy. The plaintiff had infrequent direct contact with Lancaster.

Throughout his employment as a Captain, the plaintiff regularly received satisfactory job performance evaluations. At no time during his term as Sheriff did Lancaster criticize the plaintiff's job performance. On May 12, 1982, two months before the plaintiff was discharged, Sheriff Lancaster submitted a Personnel Status Report to the County Personnel Director stating that the plaintiff was satisfactorily performing the requirements of his job.

In November, 1981, Sheriff Lancaster called the plaintiff into his office to discuss merit raises for certain deputies under the plaintiff's command. In the course of that discussion, Lancaster asked the plaintiff if he had heard whether anyone in the department was going to support Robert L. Woods, a state highway patrolman, who had just announced his intention to seek the Democratic nomination for Sheriff of Forsyth County in the 1982 primary election. The plaintiff responded that a number of deputies, including himself, would support Woods if Lancaster chose not to run for re-election. Lancaster told the plaintiff that he was going to run again, but, if re-elected, would probably not serve a full term.

Lancaster indicated that, prior to his resignation, he would hold an election within the department to choose someone to fill out his term and would ask the County Commissioners to appoint that person. The plaintiff disagreed with this proposal because he believed it was unfair to the voters. This was the last conversation, other than a casual greeting in the hall of the departmental office, which the plaintiff had with Lancaster prior to the primary election.

The plaintiff and Robert Woods were friends and discussed Woods' possible candidacy in January, 1982. At first, the plaintiff discouraged Woods from running. After an incident within the department in which the plaintiff felt that Sheriff Lancaster had been unfair

to another deputy, however, the plaintiff decided to vote for Woods.

Early in May, 1982, Captain John Sievers, the head of the Sheriff's Criminal Investigation Division, approached the plaintiff and angrily asked him if he was supporting Woods for Sheriff. When the plaintiff confirmed his support for Woods and refused to pledge his support to Lancaster, Sievers accused him of an act of disloyalty and threatened to knock the plaintiff's glasses off. No physical contact occurred during this incident.

Later that month, Major Dillon called almost all of the members of the department into his office and solicited campaign contributions for Sheriff Lancaster and signatures on a petition

to be published in a newspaper ad. Most of the deputies complied, including some who supported Lancaster's opponent, Woods. The plaintiff refused to contribute when solicited by Major Dillon.

After a public controversy arose over whether Major Dillon's solicitation of funds for Sheriff Lancaster's campaign while on County property violated the County Code, Lancaster called a meeting of his entire department at a skating rink located in Kernersville, North Carolina. Virtually all of the deputies attended, including many who were on-duty. The purpose of this meeting was to return contributions made as a result of Major Dillon's solicitation efforts. However, speeches were made on behalf of Lancaster's candidacy and campaign

materials, such as cards and yard signs, were distributed. Sheriff Lancaster also addressed the group and told the deputies that anyone who could not support him in this campaign should resign. Sheriff Lancaster had made a substantially similar statement at a departmental meeting during the 1978 campaign.

Shortly after this meeting, the plaintiff decided to take an active part in the campaign of Robert Woods for Sheriff. He distributed yard signs and talked with individuals throughout the county about Woods' candidacy. All of these activities were undertaken while the plaintiff was off duty and out of uniform. Other members of the Sheriff's Department were aware of the plaintiff's

support for Woods, but the plaintiff did not attempt to persuade any other deputies to vote for Woods. Several members of the plaintiff's platoon testified that the plaintiff's political activities had no impact on his performance of his duties as Captain.

On election day, June 29, 1982, the plaintiff was assigned to the third shift and was therefore off duty when the polls opened. He worked at a polling place near his home and handed out literature for Woods while wearing a baseball cap which said "Woods for Sheriff." During the day, Sheriff Lancaster came to this polling place and observed the plaintiff working in support of Woods, and the two exchanged

pleasantries.

Lancaster won the primary election.

On the following Tuesday, July 6, 1982, the plaintiff passed Lancaster in the hall at the Sheriff's Department and asked Lancaster if he could speak with him. The plaintiff intended to explain why he had supported Woods in the primary election and to advise Lancaster that he could still perform his duties and support the Sheriff. Lancaster told the plaintiff that he had thought about him much "since last week and all" and requested the plaintiff's resignation. Lancaster stated that he no longer wanted the plaintiff to represent him, but gave no reason for this action except to say that it would be best for the department. When the plaintiff

refused to resign, Lancaster discharged him on July 7, 1982.

ARGUMENT

1. Introduction

Rule 17 of the Rules of the Supreme Court of the United States enumerates specific grounds on which this Court will grant a writ of certiorari. These grounds, which are not exclusive, provide, in pertinent part, that review may be granted:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; ... .
>
> . . .
>
> (c) When a ... federal court of appeals has decided an important question of federal law which has not been, but

> should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

The issue presented by this case involves an extremely important issue of constitutional law on which federal courts of appeals have diverged. At stake in this case are not only the constitutional rights of public employees to free speech, but also, just as important, the constitutional right of a litigant in a constitutional case to have issues of fact determined by a jury, as mandated by the Seventh Amendment to the United States Constitution and 42 U.S.C. §1983. Given the dual importance of this issue under the United States Constitution, this question should be finally resolved by the United States Supreme Court.

In Pickering v. Board of Education, 391 U.S. 563 (1968), this Court ruled that, when a public employee is discharged for expressing his views on a matter of public concern, the Court must determine whether the government's interest in the effective and efficient fulfillment of its responsibilities to the public outweighs the employee's interest in the exercise of his right to freedom of speech. In Connick v. Myers, 461 U.S. 138 (1983), this Court stated that the type of showing required by the public employer depended upon the magnitude of the First Amendment interest involved. At a minimum, the employer must demonstrate that he reasonably believed that the employee's action

would disrupt the operations of the agency involved.

In accordance with the principles set forth in Connick and Pickering, the issues to be resolved in a case involving a claim by a public employee that his discharge was violative of his rights under the First Amendment are as follows:

a) Whether the employee's expression was upon a matter of legitimate public concern;

b) If so, whether the employee's interest in engaging in such activity was outweighed by the employer's interest in promoting the efficiency of the public services it performs;

c) Whether the employee's speech activity was a substantial factor in the

employer's decision to discharge him; and

d) Whether the employer would have made the same decision regardless of the employee's protected speech activity.

Thus, this Court has clarified the issues which must be decided in a case involving a public employee's right to free speech. What this Court has not decided, however, is how such issues should be resolved when an employee has exercised his right to a jury trial under the Constitution and federal statutes. Although the Connick opinion states that the Pickering balance test is an issue of law for determination by the Court, this Court did not set forth the appropriate procedure in those cases in which the facts to be weighed in the

balance are in dispute. The Connick case involved a bench trial, and therefore this Court did not have cause to discuss the role of the jury in this type of case. As set forth above, the Fourth Circuit ruled that the entire Pickering balance, including the determination of disputed issues of fact, was a matter of law for the Court. In so doing, the Fourth Circuit overruled its own clear precedent to the contrary. See Kim v. Coppin State College, 662 F.2d 1055, 1064-65 (4th Cir. 1981). There is considerable confusion among the federal courts of appeal concerning this issue. Therefore, this Court should consider this important question of federal law.

2. Lower Court Decisions in the Present Case

In the present action, there was no question that the plaintiff was discharged because of his campaign activities on behalf of Sheriff Lancaster's primary opponent, and the District Court found that these campaign activities constituted a form of speech concerning a matter of legitimate public concern. The principal issue in the case, therefore, was whether the defendants' interest in the efficient operation of the Sheriff's Department outweighed the plaintiff's constitutional interest in this particular form of expression.

The District Court recognized that the facts pertaining to the defendants' allegations of actual or potential

disruption caused by the plaintiff's speech were in dispute. Initially, the Court submitted an issue concerning these factual predicates to the jury for determination prior to engaging in the Pickering balancing process. After the jury determined that the defendants had not established the existence of any potentially disruptive impact which might outweigh the plaintiff's interest in the free expression of his political beliefs, however, the District Court rejected the verdict and labelled it merely an "advisory opinion." The Court then found facts in favor of the defendants and concluded as a matter of law that the defendants' interest outweighed the plaintiff's interest in this case and that, therefore, the plaintiff's

campaign activities were not entitled to constitutional protection. (App. pp. 41-43).

The United States Court of Appeals for the Fourth Circuit affirmed the Trial Court's belated decision to remove this factual dispute from the province of the jury, stating that:

> The weighing of this balance is a question of law for the court, not a question of fact for resolution by a fact finder. Relying on Connick, this court has held that the entire balancing process is an inquiry of law for the court... .
>
> Joyner contends that it is the province of a jury or a fact finder to determine the underlying facts to which the court then applies the legal standard. The clear implication of Connick, however, is to the contrary. Joyner finds support for his position in Kim v. Coppin State College, 662 F.2d 1055, 1064 (4th Cir. 1981), but Kim predated

> Connick. Our subsequent cases have followed Connick. In [Jones v.] Dodson, this court held that such questions "were not factual issues for the jury," but "involved questions of constitutional law for the court." 727 F.2d at 1337 n. 11 ... .
>
> The district court properly concluded that the question presented is one of constitutional law for the court. In the resolution of that question, the advisory jury had no role to play.

(App. pp. 13-14).

3. Reasons Why Writ Should Issue

The plaintiff contends that the Fourth Circuit's assessment of the "clear implication" of Connick is incorrect. Although Connick states that the inquiry into the protected status of speech is one of law and that the Court

must make an independent constitutional judgment on the facts of the case, this Court did not expressly limit an employee's right to have those facts determined by a jury. This case presents an important question of constitutional law on which the circuit courts are in disagreement.

a. Conflict among Circuit Courts

In a recent post-Connick case, the United States Court of Appeals for the Eighth Circuit also considered the role of the jury in public employee discharge cases. In Lewis v. Harrison School District No. 1, 805 F.2d 310 (8th Cir. 1986), a school principal was discharged for making a speech to the school board in which he criticized the superintendent's decision to transfer one of

his teachers to another school. The principal contended that his discharge violated his First Amendment rights, and the school system responded that its interest in the efficient operation of its schools outweighed the plaintiff's interest in freedom of speech. At trial, prior to engaging in the Pickering balancing test, the Court submitted interrogatories to the jury concerning the disruption caused by the plaintiff's speech. The jury found that the proper operation of the school system required a close working relationship between the plaintiff and the school superintendent, but that the plaintiff's speech "did not create such disharmony" between these individuals that it would have been impossible for

the plaintiff to have properly performed his duties thereafter. The jury also found that the speech did not have and would not have had a disruptive effect on the school had the plaintiff not been fired. Id. at 312-13. Notwithstanding these jury findings, the District Court ruled that the plaintiff's speech was not constitutionally protected.

In reversing this decision, the Eighth Circuit held that it was error for the District Court to disregard the jury's findings in performing its Pickering balance, stating that:

> While the ultimate decision is one of law, the court must defer to factual findings unless they are totally unsupported by the record.

Id. at 315. In so holding, the Eighth Circuit followed its pre-Connick decision in McGee v. South Pemiscot School District R-V, 712 F.2d 339 (8th Cir. 1983).

Two other circuits, in addition to the Fourth Circuit in Kim, supra, had reached the same result in pre-Connick cases. The Seventh Circuit, in McGill v. Board of Education, 602 F.2d 774 (7th Cir. 1979), held that determining whether speech was too disruptive was a matter for the jury. In Schneider v. City of Atlanta, 628 F.2d 915 (5th Cir. 1980), the Fifth Circuit stated that:

> Although the balancing test prescribed in Pickering is a question of law for the Court, this circuit has recognized that in striking this balance...there are factual matters appropriate for determination by a jury.

Id. at 919 n.4

The Fourth Circuit's opinion in the present action, therefore, creates a conflict among the circuits concerning the role of the jury in this type of case, and, in particular, the effect of Connick on that role. The Eleventh Circuit apparently concurs with the Fourth Circuit. See Eiland v. City of Montgomery, 797 F.2d 953, 957 n.5 (11th Cir. 1986). This Court should therefore review this case in order to provide guidance to the lower courts on this important question.

b. Important Question of Federal Law.

The resolution of this issue is necessary not only to protect the First Amendment rights of public employees, but also to protect the equally valuable

right of a litigant in our system of justice to a trial by jury.

Traditionally, under our system of justice, the respective roles of the Judge and jury are determined based on the distinction between questions of law and questions of fact. It is this distinction which was brought forward from the English common law and provided the foundation for the Seventh Amendment to the United States Constitution. This Court has recognized the province of the jury to decide issues of fact where the right to a jury trial applies. The Court stated in Dimick v. Schiedt, 293 U.S. 474, 486 (1935), that:

> The controlling distinction between the power of the court and that of the jury is that the former has the power to determine the law and the latter to determine the facts.

See also Slocum v. New York Life Ins. Co., 228 U.S. 364 (1913). Indeed, this Court has traditionally protected the jury's role from intrusion by the courts. Id.

While undoubtedly this law/fact distinction is difficult to apply to some issues, it is most easily applied to determinations of historical facts. Regarding these issues, the fact-finder must determine historical events which underlie a particular claim. Such determinations traditionally depend on the credibility of witnesses recalling such events. In this area, the jury is uniquely qualified to decide what took place and what effect it had. Juries have also traditionally been called upon

to determine whether an individual's actions are reasonable under a set of circumstances established by the evidence.

The nature of the present case should not diminish this traditional role of the jury to decide the underlying facts in the case. While Connick indicates that the Pickering balance is an issue of law for the Court, it does not authorize the trial courts to usurp the function of the jury in a jury trial as to the underlying facts weighed in that balance.

In support of its decision that Connick requires the Court to make those findings of fact necessary in order to engage in the Pickering balancing test,

the Fourth Circuit, in Jones v. Dodson, 727 F.2d 1329, 1337 (4th Cir. 1984), cited footnote 10 of this Court's opinion in Connick, which reads as follows:

> "The Constitution has imposed upon this Court final authority to determine the meaning and application of those words of that instrument which requires interpretation to resolve judicial issues. With that responsibility, we are compelled to examine for ourselves the statements in issue and the circumstances under which they are made to see whether or not they ... are of a character which the principles of the First Amendment, as adopted by the Due Process Clause of the Fourteenth Amendment, protect." Pennekamp v. Florida, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946)(footnote omitted).
>
> Because of this obligation, we cannot "avoid making an independent constitutional judgment on the facts of the

> case." Jacobellis v. Ohio, 378 U.S. 184, 190, 84 S.Ct. 1676, 1679, 12 L.Ed.2d 793 (1964)(Opinion of BRENNAN, J). See Edwards v. South Carolina, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963); New York Times v. Sullivan, 376 U.S. 254, 285, 84 S.Ct. 710, 728, 11 L.Ed.2d 686 (1964); NAACP v. Claiborne Hardware Co., ____ U.S. _____, _____, n. 50, 102 S.Ct. 3409, 3427, n. 50, 73 L.Ed.2d 1215 (1982).

None of the cases cited by this Court in that footnote support the Fourth Circuit's limitation of a public employee's right to have factual issues determined by a jury in cases involving the deprivation of the right to freedom of speech. Rather, the clear thrust of this series of cases is that the right to freedom of speech is to be afforded every conceivable protection and should only be limited under the most compelling circumstances. Once the facts

of the particular case have been determined by the jury or other fact finder, the Court must analyze the facts in order to vindicate First Amendment rights unduly circumscribed by the fact finder. See Parker, J. Wilson, "Free Expression and the Function of the Jury," 65 Boston Univ. L.Rev. 483 (1985). See also Pennekamp v. Florida, 328 U.S. 331 (1946) (where the Court reversed the lower court's findings of fact underlying the conviction of a newspaper editor for contempt for criticizing the courts in an editorial); Jacobellis v. Ohio, 378 U.S. 184 (1964) (where the Court reversed a trial judge's finding that a film was obscene); Edwards v. South Carolina, 372 U.S. 229 (1963) (where the Court reversed the convictions of

demonstrators who were protesting racial discrimination); New York Times Co. v. Sullivan, 376 U.S. 254 (1964) (where the Court reversed a libel verdict on the ground that there was not sufficient evidence of actual malice); and NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (where the Court reversed a lower court finding that white merchants had suffered economic loss as a result of a black boycott because there was insufficient evidence to support that verdict).

The plaintiff's position is supported by decisions in other areas of first amendment law. For example, in the area of obscenity, the Court has traditionally protected the role of the jury

to determine "community standards," which is dispositive of the ultimate issue of whether a work is, in fact, obscene. See Miller v. California, 413 U.S. 15 (1973); and Parker, supra, at 504 - 505. In the privacy context of first amendment litigation, the courts have recognized the role of the jury to decide the underlying factual predicates which determine the right to first amendment protection. Accordingly, in Virgil v. Time, Inc., 527 F.2d 1122 (9th Cir. 1975), the United States Court of Appeals stated that:

> We cannot agree that the First Amendment requires that the question must be confined to one of law to be decided by the judge. Courts have not yet gone so far in other areas of the law involving First Amendment problems, such as libel and obscenity.

> The testing of facts against a standard founded on community mores does entail judgment of the court itself. But if there is room for differing views as to the state of community mores or the manner in which it would operate under the facts in question, there is room for the jury function. The function of the court is to ascertain whether a jury question is presented.

527 F.2d at 1130; Parker, supra, at 506-7.

The underlying facts which the jury found in the present action are clearly facts which have traditionally been determined by juries. The nature of the "disruption" issue which was submitted to the jury in this case and decided in favor of the plaintiff demonstrates the appropriateness of involving the jury at this stage of the case.

The jury was asked to determine whether Sheriff Lancaster reasonably believed that the plaintiff's campaign activities could affect the morale, efficiency, discipline or administration of the Forsyth County Sheriff's Department. This formulation closely followed the relevant authorities in this area. See, e.g., Connick, 461 U.S. at 154 (plaintiff's First Amendment interest outweighed by action which her employer "reasonably believed would disrupt the office, undermine his authority, and destroy close working relationships"); Jones v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984) (employee's speech must be weighed against "the degree to which the employee's conduct is justifiably viewed

by the public employer as an actual or threatened disruption of the conduct of government operations for which the employer is responsible"); Buschi v. Kirven, 775 F.2d 1240, 1248 (4th Cir. 1985)(relevent question for the jury was whether the employee's statements "could reasonably affect the efficiency, discipline or administration of the agency"). The use of the terms "reasonable" and "justified" in describing the employer's perception of actual or potential disruption clearly indicates that an objective standard is to be applied.

In this action, the jury found that Sheriff Lancaster's alleged belief concerning the actual or potential disruptive impact of the plaintiff's campaign

activities was not reasonable. Under Connick and Pickering, where the employee's speech activity does not disrupt the operations of the public employer nor even support a reasonable belief that such disruption may occur, there is nothing on the employer's side of the scales and therefore the Pickering balance must be struck in favor of the employee.

While the threat to the right to a jury trial from the opinions below looms large, the consequential threat to First Amendment freedoms is also substantial. This threat is vividly illustrated by the manner in which both lower courts found the facts contrary to the jury

verdict to support their ultimate conclusions. Indeed, a review of the findings of fact contained in the opinions of these courts demonstrates persuasively the need for protection of the plaintiff's right to a trial by jury in the interest of First Amendment freedoms.

For example, both the District Court and the Fourth Circuit found that the plaintiff's campaign activities on behalf of Woods were partially motivated by his desire for a promotion within the department. This finding was based on the testimony of a single witness who stated that the plaintiff told him that he would be the next Major if Woods were elected. The plaintiff flatly denied

having made this statement, thus setting up a disputed issue of fact. The jury's verdict indicates that it decided this credibility issue in favor of the plaintiff.

The Court of Appeals found as a fact that the plaintiff advocated the election of Woods "within the Department." Apparently, this finding of fact was based on evidence that the plaintiff acknowledged to other deputies during discussions at the department that he was supporting Woods. Evidence was presented, however, that at no time did the plaintiff attempt to persuade any fellow deputy to join him in his support of Woods, nor did the plaintiff consider any of his subordinate's political views in determining work

assignments. Again, it must be presumed that the jury assessed this limited on-duty activity by the plaintiff and found that it had no detrimental effect on the operation of the department.

The Court of Appeals found that the plaintiff's activities on behalf of Woods "caused friction" within the department. This finding, of course, is directly contrary to the jury's verdict. Neither the Fourth Circuit nor the District Court makes mention of the abundant evidence presented at trial that the campaign activities on behalf of Sheriff Lancaster caused a great deal of tension and unrest within the department and clearly overshadowed whatever impact the plaintiff's activities

may have had. Two deputies testified that, although they personally supported Woods, they contributed money to Sheriff Lancaster's campaign when solicited by Major Dillon. One deputy, who testified on behalf of Sheriff Lancaster, stated that he complied with the Sheriff's request that he work at a polling place on election day, even though he also supported Woods. Evidence was also presented of departmental meetings at which Sheriff Lancaster told his deputies that anyone who could not support his candidacy should resign. The jury's verdict indicates that it found that any potential disruption caused by the plaintiff's activities on behalf of Woods paled in comparison to the manifest disruption caused by the Sheriff's

re-election campaign.

The Court of Appeals found as a fact that "[t]wenty to thirty members of the department reported to Sheriff Lancaster that Joyner's activities were causing pervasive distrust and plummeting morale." At trial, Sheriff Lancaster could only name three such individuals, and all of these deputies were known to be supporters of Robert Woods. The credibility of the Sheriff's assertions of widespread distrust, therefore, was clearly questionable, and the jury obviously discounted the Sheriff's testimony on this issue.

Finally, the District Court and the Court of Appeals failed to mention the fact that the plaintiff was discharged after the primary election and therefore

after his campaign activities had come to an end. Under these circumstances, the jury was clearly justified in concluding that Sheriff Lancaster's belief that these activities could disrupt his department in the future was unreasonable.

Resolution of these factual issues dictated the result in the present action. The manner in which the facts were found by the lower courts, and the ease with which the courts were able to ignore evidence favorable to the plaintiff which the jury had found persuasive, underscores the importance of the issue presented by this Petition. It is essential, therefore, that this Court determine whether the underlying facts in First Amendment actions under Pickering should be decided by the judge or the jury.

CONCLUSION

For the reasons set forth above, the Petitioner urges the Court to grant this Petition for Writ of Certiorari.

Respectfully submitted this 26th day of May, 1987.

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 85-2392

Harry Leon Joyner,

Appellant,

versus

Manly Lancaster;
County of Forsyth,

Appellees.

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Hiram H. Ward, District Judge. (C-82-765-WS).

Argued: June 2, 1986

Decided: March 26, 1987

Before CHAPMAN and WILKINSON, Circuit Judges and HAYNSWORTH, Senior Circuit Judge.

Robert M. Elliot and David C. Pishko (Pfefferkorn, Pishko & Elliot, P.A., on

brief) for Appellant; Michael A. Gilles and Bynum M. Hunter (Smith, Helms, Mullis, & Moore; P. Eugene Price, Jr., on brief) for Appellees.

HAYNSWORTH, Senior Circuit Judge;

The plaintiff, a former captain in the Forsyth County sheriff's department, brought this action against the county and the sheriff alleging that he was discharged in violation of his First Amendment rights. The district court concluded that the discharge was not unlawful, and we now affirm.

I.

At the time of his discharge, Joyner was the senior of four captains in the sheriff's department. He had only two superior officers, Sheriff Lancaster and Major Dillon. The department employed more than one hundred fifty deputies, and Joyner, a captain in the Patrol

Division, supervised fifteen deputies patrolling the county during his eight hour shifts. He was involved in planning, reviewing and evaluating the work of deputy sheriffs. He was required to work closely with other supervisory personnel to maintain effective departmental operations. He reported primarily to Major Dillon. He appears to have been a competent officer before the election campaign of 1982.

The sheriff of Forsyth County is elected for four year terms of office. In 1982, Sheriff Lancaster was a three-term incumbent, but he faced stiff opposition in the Democratic primary of that year from Robert Woods of the Highway Patrol. Woods was a good friend of

Joyner, and in November, 1981, Joyner told Sheriff Lancaster that he and others in the department would support Woods if the sheriff decided not to run. According to Joyner, the sheriff told him that he would run but that, if elected, he probably would not serve the full term. He said that if he decided to resign, he would hold an informal election within the department and recommend the appointment of the winner of that election as his successor.

Joyner was unenthusiastic about the proposal. He told Woods that Sheriff Lancaster, if reelected, planned to resign before completion of his four-year term, and Woods used that information in his public campaign against Lancaster.

There was testimony that Joyner had told a former officer that he expected to be the major in the department if his friend, Woods, was elected. That expectation was obviously a happier one than his anticipated lot if Lancaster was reelected. Joyner also testified that he disagreed with two personnel decisions made by Sheriff Lancaster, and he thought that Woods, as sheriff, would treat all departmental personnel fairly.

Relatively quiet support of Woods by Joyner became loud and open in May, 1982. Within the department he advocated the election of Woods. While off duty and out of uniform, he passed out campaign literature at stores and shopping centers; he put up yard signs; he encouraged people he knew to vote for

Woods, and, on election day, he engaged in electioneering for Woods at a polling place.

Sheriff Lancaster won the election.

Though some others in the department of lesser rank also supported Woods, but not so overtly as Joyner, Joyner's activities caused friction. Twenty to thirty members of the department reported to Sheriff Lancaster that Joyner's activities were causing pervasive distrust and plummeting morale. They urged him to take corrective action. Major Dillon, Lieutenant Oldham, the Internal Affairs officer, and Robert Nelson, the sheriff's administrative assistant, reported that Joyner's activities had caused, and were continuing to cause, problems. They recommended

that Sheriff Lancaster discharge Joyner. Lieutenant Oldham told Sheriff Lancaster that he would not and could not work with Joyner after the election.

Sheriff Lancaster testified that by the time of the election he had become convinced that Joyner's activities had caused much dissension and ill feeling in the department. Shortly after the election, the sheriff asked Joyner to resign. When Joyner refused to do so, the sheriff discharged him.

Joyner sought a preliminary injunction, which was denied. Joyner v. Lancaster, 553 F.Supp. 809 (M.D.N.C. 1982). The district court also denied the defendants' motions for summary judgment, and the case went to trial.

At the trial, an advisory jury was

impaneled and asked whether Sheriff Lancaster reasonably believed that Joyner's campaign activities on behalf of Woods could affect the morale, efficiency, discipline or administration of the department. The jury answered the question in the negative, but the district court concluded that the answer was against the clear weight of the evidence. The district court also determined that, notwithstanding its initial uncertainty, "the entire balancing process is for the Court." It then resolved the balancing test in the defendant's favor and dismissed the action.

II.

There is no question in this case

that Joyner's political activity was the cause of his discharge. The only substantive question is whether the free speech guaranty of the First Amendment, as applied to Forsyth County, North Carolina through the Fourteenth Amendment, lent such protection to that activity as to prevent his discharge from his public office.

A.

The legality of discipline imposed upon a public employee because of the employee's speech is determined through a balancing process. Connick v. Myers, 461 U.S. 138 (1983). Connick was the most recent culmination of a succession of cases in which the principle was

developed. See Pickering v. Board of Education, 391 U.S. 563 (1968); Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977); Givhan v. Western Line Consolidated School District, 439 U.S. 410 (1979). Under that principle, the court must consider whether or not the speech implicated a matter of public concern. If a matter of public concern was implicated, the court must consider whether the employee's interest in the speech was outweighed by the employer's "interest in the effective and efficient fulfillment of its responsibilities to the public." Connick, 461 U.S. at 150. See Jurgensen v. Fairfax County, 745 F.2d 868, 878-879 (4th Cir. 1984); Jones

v. Dodson, 727 F.2d 1329, 1334 (4th Cir. 1984).

Each branch of the analysis is subject to many variables. On the first branch, speech in the public interest by a public spirited citizen is entitled to greater protection than speech in the interest of the speaker or of another whose cause the speaker advocates. On the other branch, the interest of the employer in maintaining efficiency in the rendition of public services will vary substantially with the nature of the employment relationship. As this court said in Jurgensen,

"nonpolicymaking employees can be arrayed on a spectrum, from university professors at one end to policemen at the other. State inhibition of academic

freedom is strongly disfavored . . . . In polar contrast is the discipline demanded of, and freedom correspondingly denied to [,] policemen." 745 F.2d at 880. Those kinds of variables have been noted by other courts. See e.g., McMullen v. Carson, 754 F.2d 936, 939-40 (11th Cir. 1985); Hughes v. Whitmer, 714 F.2d 1407, 1419 (8th Cir. 1983), cert. denied, 465 U.S. 1023 (1984).

B.

The weighing of this balance is a question of law for the court, not a question of fact for resolution by a fact finder. Relying on Connick, this court has held that the entire balancing process is an inquiry of law for the court. Dodson, 727 F.2d at

1334; see also Berger v. Battaglia, 779 F.2d 992, 998 (4th Cir. 1985), cert. denied, 106 S.Ct. 2278 (1986); Jurgensen, 745 F.2d at 878-80.

Joyner contends that it is the province of a jury or fact finder to determine the underlying facts to which the court then applies the legal standard. The clear implication of Connick, however, is to the contrary. Joyner finds support for his position in Kim v. Coppin State College, 662 F.2d 1055, 1064 (4th Cir. 1981), but Kim predated Connick. Our subsequent cases have followed Connick. In Dodson, this court held that such questions "were not factual issues for the jury," but "involved questions of constitutional law for the court." 727 F.2d at 1337 n.11; see also

Berger, 779 F.2d at 998.

The district court properly concluded that the question presented is one of constitutional law for the court. In the resolution of that question, the advisory jury had no role to play. Even if its verdict had not been against the clear weight of the evidence, the entire matter was one for determination by the court.

III.

Joyner contends that the district judge misapplied the balancing test. The district court, he says, erroneously minimized the constitutional stature of his campaign activities and improperly found that those activities caused the dissension within the

department.

Joyner may have acted in part out of a conviction that Woods would make the better sheriff and would run a more efficient office in the public service. It is undeniable, however, that he acted in substantial part in his own interest. He evidently believed that if Lancaster were reelected and resigned, he, Joyner, would not win the straw vote and become the sheriff. He hoped that if Woods were elected, he would be promted to the position of major. To the extent that a public employee's expression is in furtherance of matters of personal concern, the public employer's burden of showing the predominance of the public's interest in continuing the efficient functioning of

a public entity is lessened.

Joyner was a highly placed official in a para-military unit. He had only two superiors. He had an important role in the implementation of the sheriff's policies, and he was an essential link between the sheriff and the deputies whom he supervised. In those circumstances, mutual confidence and loyalty are of great importance. The combination of Joyner's vigorous campaign and his high position in the department created more than a potential for disruption; they actually created that disruption which would have sufficed for his discharge if it had only reasonably been apprehended.

It is no answer to say, as Joyner does, that the disruption in the depar-ment was simply a reflection of fear on

the part of many members that if Sheriff Lancaster was not reelected they would lose their jobs. The rather violent reaction of the other members of the department may have stemmed in substantial part from concern about their own job security and not alone from a sense of loyalty to Sheriff Lancaster, but it was not their concerns that triggered the disruption. The disruption and antagonisms were immediately and directly caused by Joyner's political activity. There would have been no disruption in this case had not a highly placed insider engaged in partisan political activity that seemingly enhanced the threat to the job security of the other employees. The problems were not correctable by assurance of continued

employment to the other employees. Sheriff Lancaster not unreasonably concluded that they were correctable only by removing Joyner from the department. The district court properly weighed the balance and concluded that the sheriff's interest in the effective and efficient fulfillment of his department's responsibilities outweighed Joyner's interest in exercising his First Amendment rights. The public's interest in the removal of the source of disruption within the department was greater than Joyner's interest that, at least, in part, was personal, in openly supporting the sheriff's political opponent.

IV.

Our conclusion makes it unnecessary

to address the other contentions made on appeal.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

WINSTON-SALEM DIVISION

HARRY LEON JOYNER,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C-82-765-WS
	:	
MANLY LANCASTER, Individually and in his official capacity as SHERIFF OF FORSYTH COUNTY, and COUNTY OF FORSYTH, a public body corporate,	:	
	:	
Defendants.	:	

MEMORANDUM OPINION AND ORDER

WARD, Chief Judge

This matter came to trial on November 4, 1985. The plaintiff had brought this action under 42 U.S.C.

§1983 alleging the defendant wrongfully discharged him for the exercise of his first amendment rights. At the close of all the evidence the Court, after submitting an issúe to an advisory jury, engaged in the balancing of interest test as required by Pickering and Connick. The Court determined that the balance tipped substantially on the side of the defendants. The Court found that defendant Lancaster (Lancaster) acted properly in considering the adverse effects of plaintiff's campaign activities upon the Sheriff's Department in his decision to dismiss the plaintiff, and directed a verdict for the defendants.

The plaintiff Harry Joyner (Joyner)

was the senior Captain[1] with the Forsyth County Sheriff's Department[2] at the time of his discharge. As Captain his only superiors, in a department of approximately 160 men, were the Sheriff (Lancaster) and a Major (G.R. Dillon). The plaintiff was a Captain in the patrol division within which he supervised one shift of patrolmen. The posi-

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[1]There were four Captains in the Sheriff's Department.

[2]A sheriff in North Carolina occupies a constitutional public office. Each county elects a sheriff every four years. The right of the sheriff to appoint deputies is a common law right; deputies appointed by the sheriff are public officers, but their duties and authority relate only to ministerial duties imposed by law upon the sheriff, in the performance of which they act for the sheriff in his name and right. N.C. Const. Art. VIII, §2; Gowens v. Alamance County, 216 N.C. 107, 3 S.E.2d 339 (1939).

tion of Captain entailed planning, reviewing and evaluating the work of deputy sheriffs, and also working closely with other supervisory personnel to maintain effective operations in the Sheriff's Department.

This lawsuit focuses on the democratic primary election of June 1982 and events leading up to that primary.[3]

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[3]This case does have qualities akin to party patronage cases such as Elrod v. Burns, 427 U.S. 347, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) and Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980). However, in this case the plaintiff engaged in overt expressive conduct (campaigning) that led to his discharge. The plaintiff's discharge was not solely for political reasons, but was a mid-spectrum situation to which Connick v. Myers, 461 U.S. 150, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) would apply. See Jones v. Dodson, 727 F.2d 1329, 1334-35 (4th Cir. 1984); McBee v. Jim Hogg County Tex., 730 F.2d 1009 (5th Cir. 1984).

Lancaster had two opponents in this election - Bob Carter and Robert Woods. Woods presented Lancaster, although a three term incumbent sheriff, with tough opposition due to Woods' background as a highway patrolman and his connections in the county. The primary election became an often discussed topic in the Sheriff's Department.

Prior to May 1982 Joyner had decided to support Lancaster's opponent Robert Woods. The reasons for this decision are somewhat unclear. Plaintiff proffers the concern that Lancaster would not fill out his entire term as his reason. However, at trial the defendants offered credible evidence to show that personal advancement may have been a

significant reason for this decision.[4]

Immediately after deciding to support Woods, Joyner limited his activities to talking to family members and urging them to vote for Woods. However, the character of Joyner's campaign activities changed in May 1982. Joyner began to campaign actively for Woods.[5]. From May

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[4]Credible evidence was presented that the defendant had told at least one person he would be the next Major of the Sheriff's Department. Plaintiff was a good friend of Woods and hunted often with him. Only the political naive would believe that the plaintiff did not have expectations of being rewarded should Woods win the election.

[5]At that time the primary was one month away and a period of escalated political activity. The plaintiff stated that a heated confrontation at the Sheriff's Department with Captain Sievers concerning the upcoming primary election motivated his open campaign activity.

until the primary, Joyner talked to friends, put up yard signs, handed out campaign literature to friends at stores, and left cards at various businesses throughout the county. Joyner also handed out literature and encouraged people to vote for Woods on election day at his polling place.[6] These campaign activities were limited to off duty hours.

During the campaign the plaintiff testified to only talking to two deputies about his support and campaigning

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[6]Joyner, on eletion day, while wearing a Woods' cap, conversed with the Sheriff at this polling place about the turnout.

for Woods.[7] However, the plaintiff's support and campaign activities were well known throughout the department. Joyner was not alone in his support of Woods. Several deputies testified that during the primary they supported Woods. The evidence did show the plaintiff to be the only Captain who supported Woods and the most active campaigner on Woods' behalf in the department.

During the primary campaign election friction existed in the department bet-

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[7] Deputy Bottoms said that on duty the plaintiff said more than once he was supporting Woods. Joyner attempts to sterilize his campaign activities totally in the vacuum of off-duty hours. This attempt to neatly compartmentalize his activity defies common sense, and more importantly the evidence.

ween Woods and Lancaster supporters.[8] Disharmony and unrest were commonplace. The victory of the defendant Lancaster did not ease the tension. Many Woods' supporters were certain they would not be resworn - which would mean their termination. Lt. Oldham, the internal affairs officer, described the department's atmosphere as one of dissension, mistrust, and bitterness; a department with significant loyalty problems. Lt. Oldham,[9] Major Dillon and

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[8] Each side was fearful of the ramifications if the other side's candidate was elected.

[9] Lt. Oldham stated he could not work with the plaintiff after the election.

twenty to thirty members of the department approached Lancaster urging the Sheriff to take some corrective action or face serious consequences in running the department.

On July 6, 1982, Lancaster informed the plaintiff that he would be terminated unless he resigned the next day.[10] Lancaster said his action was done for the best interest of the department. At trial Lancaster explained his decision as based on: (1) the dissension and disharmony in the department caused by the plaintiff's activities; and (2) the advice of top

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[10]After consulting with family, Woods and an attorney the plaintiff decided not to resign and was therefore terminated.

level personnel and deputies that something had to be done. Joyner was the only member of the Sheriff's Department who was terminated after the election. Joyner's claim rests on his contention that this discharge from the Forsyth County Sheriff's Department was a violation of his first amendment right to freedom.

A public employee may not be discharged for expression of ideas on any "matter of legitimate public concern," Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968), unless the public employer's "interest in the effective and efficient fulfillment of its responsibilities to the public," outweighs the employee's interest in free expression

of the ideas. Connick v. Myers, 461 U.S. 138, 150-51, 103 S.Ct.1684, _____, 75 L.Ed.2d 708, 722-23 (1983). The Court must reach the most appropriate possible balance of the competing interests; giving full consideration to the government's interest in the effective and efficient fulfillment of its responsibilities to the public. Connick v. Myers, 461 U.S. at 150, 103 S.Ct. at ___, 75 L.Ed.2d at 722.

In deciding the threshold issue in the Pickering-Connick analysis, the Court finds the plaintiff's campaign activities to touch on matters of public concern in a limited sense. The plaintiff's campaign activities did impact on a matter of public concern - that being the election of a sheriff to serve the citizens of Forsyth County.

The Supreme Court has shrouded matters touching on political activity with sanctity. E.g., Branti v. Finkel, 445 U.S. 507, 100 S.Ct. 1287, 63 L.Ed.2d 574 (1980) (official pressure upon employees to work for political candidate not of the worker's own choice a coercion of belief in violation of fundamental rights). Plaintiff's campaigning was partially motivated by his desire to have elected the most qualified person, whom he believed was Woods because of Lancaster's desire to not complete his term if elected.[11]

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[11] During the election Lancaster publicly denied that he would not fulfill his term. However, he did not fulfill his term due to the most serious of health reasons. He resigned mid-term after an operation and diagnosis of incurable cancer.

Joyner's campaign activities were also motivated by purely personal interest in advancement in the department, and concern over working with a new sheriff appointed from departmental ranks should Lancaster not complete his term. Who would be the next sheriff was not just of interest to Joyner as a citizen of Forsyth County but was of paramount concern to him as the Senior Captain in the Sheriff's Department. Plaintiff's campaign activities were as much motivated by personal employment concerns as motivated by his views as a citizen on a matter of public concern. The Supreme Court has been explicit in denying protection to speech upon matters of personal

interest. See Connick v. Myers, 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

The fact that the plaintiff's speech addressed matters of public concern in a somewhat limited sense lessens the defendants' burden in justifying the discharge of the plaintiff.[12]

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[12]Having determined the plaintiff's activities were upon matters of public concern, the Court heard evidence concerning the employer's interest in regulating the plaintiff's activities. At the close of all the evidence the Court decided to submit an issue to the jury for an advisory verdict. That issue read:

> Did Sherif Lancaster reasonably believe that the plaintiff's campaign activities could affect the morale, efficiency, discipline or administration of the Forsyth County Sheriff's Deparment?

Although aware of the weight of authority holding that the Pickering-Connick balance was a matter of law, the Court was left uncertain because of the legacy of Kim v. Coppin State College, 662 F.2d 1055 (4th Cir. 1981), which held the the Court must submit an issue for the jury to determine the factual predicate for the balance. Kim's legacy seemed to be vitalized as the Fourth Circuit approved the submission of such an issue to the jury in Buschi v. Kirven, no. 84-1280 (Oct. 29, 1985). Out of an abundance of caution the Court submitted this issue to an advisory jury.

The jury answered this issue "No." The Court chose not to accept the juries' answer of "No," as it was against the clear weight of the evidence that showed actual disruption caused by the plaintiff's activities. The juries' answer demonstrates the difficulty in juries answering such questions even when the evidence is clear. The Court at this juncture is convinced that the entire balancing process is for the Court, and that any language to the contrary in Kim was overruled by Connick.

Connick v. Myers, 461 U.S. at 153-54, 103 S.Ct. at ____, 75 L.Ed.2d at 724.[13] However, in this case the defendants' interest in effective and efficient fulfillment of its responsibilities to the public were overwhelming. The magnitude of the employer's interest here was sufficient to outweigh Joyner's speech interest even if a strong showing by the employer was required because the

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[13]The plaintiff's activities were conducted primarily on his own time. Under these circumstances the defendant's interest must be greater than when an employee's activities were conducted on work time. The Court considered this higher standard place on the employer as it conducted the Pickering-Connick balance to determine if the defendants had met their burden to convince the Court that the balance tips in favor of the governmental interest. See Jones v. Dodson, 727 F.2d at 1334.

speech activity substantially involved matters of public concern. Connick v. Myers, 461 U.S. at 152, 103 S.Ct. at ___, 75 L.Ed.2d at 723.

In analyzing the employer's interest and then balancing it against the employee's interest it is necessary to consider "the importance of maintaining 'good working relationships' to ensure 'efficient and successful operation' of the public office involved. [W]here such 'close work relationships are essential to filling public responsibilities, a wide degree of deference to the employer's judgment is appropriate.'" Jones v. Dodson, 727 F.2d at 1340 n.17 (citation omitted). The Court is to give "full

consideration" to the effect of the activity on the efficiency, discipline, and proper administration of the employer. See Connick, 461 U.S. at 150, 103 S.Ct. at ___, 75 L.Ed.2d at ____. The manner, time, and place in which the allegedly protected activity took place is relevant. Connick v. Myers, 461 U.S. at 152, 103 S.Ct. at ____, 75 L.Ed.2d at 723. "[C]ourts must give weight to the nature of the employee's job in assessing the possible effect of his action on employee morale, discipline or efficiency." Jurgenson v. Fairfax County, Va., 745 F.2d 868, 880 (4th Cir. 1984).

In analyzing the weight to be given a

particular job in this connection non-policymaking employees can be arrayed on a spectrum, from university professors at one end to policeman [deputy sheriff] at the other. State inhibition of academic freedom is strongly disfavored." Jurgenson v. Fairfax County, Va., 745 F.2d at 880 (citations omitted). In polar contrast is the discipline demanded of, and freedom correspondingly denied to policemen [deputy sheriffs]. Id. Sheriff's Departments are paramilitary organizations in which discipline, esprit de corps, and a high morale are essential for the department to fulfill its responsibilities to the public. "Free speech rights of employees in those departments must thus be evaluated

with the special character of the organization in mind." Id.

In this case Joyner's position is particularly important. Joyner was one of the top six people in the entire Sheriff's Department. During his shift, when the Sheriff or Major was not present, Joyner could be considered as the acting Sheriff. His position was instrumental in implementing the Sheriff's policies. As a patrol captain Joyner was an essential and pivotal link between the Sheriff and his deputies.

By vigorously supporting Lancaster's opponent, Joyner was in essence calling for his superior (Sheriff Lancaster) to be thrown out and Joyner represented an open challenge to the Sheriff's

authority. Not only was the potential for disruption great in this department, there was actual disruption. The morale of the department during and shortly after the election was poor. The mood was one of tension, mistrust and animosity; certainly not an atmosphere conducive to solid working relationships especially those so necessary in law enforcement. Lancaster was justified in viewing Joyner's activities as having caused actual disruption and presenting a strong potential for creating future disruption of the operation of the Sheriff's Department.

The Court in balancing the interests finds the defendants' interests outweigh the plaintiff's. Connick v. Myers, 461

U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). Joyner's conduct and its results threatened to undermine the Sheriff's Department. As the Sheriff was told on many occasions by many individuals in the department something had to be done. Certainly Joyner could support and vote for the Sheriff's opponent or even encourage family members to support the Sheriff's opponent - in those scenarios the balance would tip for plaintiff. But openly campaigning against the Sheriff strikes at the very heart of the discipline, confidence and loyalty necessary to run a law enforcement body. Joyner's activities were directed towards the Sheriff. It was imperative that the Sheriff have confidence that Joyner would carry out his

policies. It was clear that during the campaign the plaintiff had undermined his working relationship with many in the department including the Sheriff. See Swank v. Carr, unpublished no. 83-1584 (April 3, 1984). The Court concludes that the defendant did not wrongfully discharge the plaintiff in violation of his first amendment rights.

IT IS THEREFORE, ORDERED that the plaintiff's action be, and the same hereby is, DISMISSED.

/s/ Hiram H. Ward
United States District Judge

December 10, 1985.

Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-2051

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HARRY LEON JOYNER,
Petitioner,

v.

MANLEY LANCASTER AND COUNTY OF FORSYTH,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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14pp

QUESTION PRESENTED

Whether the Court of Appeals for the Fourth Circuit erred in determining that the weighing of the balancing test established in Pickering v. Board of Education, 391 U.S. 563 (1968), is a matter of constitutional law for determination by the court, not a question of fact for resolution by a jury.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

No.

HARRY LEON JOYNER,

Petitioner,

v.

MANLY LANCASTER and
COUNTY OF FORSYTH,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Manly Lancaster and the County of Forsyth respectfully request

that this Court deny the Petition for Writ of Certiorari seeking to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE

The Respondents, Manly Lancaster and the County of Forsyth, generally agree with the Petitioner's statement of the case (Pet. 4-8), with the exception that Respondents disagree with the Petitioner's characterization of the District Court's decision to submit an issue to an advisory jury. It is incorrect to imply that the District Court did not indicate that the jury was serving an advisory function until after the jury verdict was rendered.

In fact, at the close of plaintiff's evidence and in response to defendants'

motions to dismiss, the trial judge announced on the record that, before reading Buschi v. Kirven, 775 F.2d 1240 (4th Cir. 1985), he had determined that the entire balancing test was a question of law for the court, but that the Fourth Circuit case had made him somewhat uncertain about that conclusion. (App. 362). Because of that uncertainty, the court proposed submitting "the second prong of the balancing test" to the jury, stating, "There is nothing wrong with the Court getting an advisory opinion from a jury." (App. 363). Both parties expressed their general agreement with the court's proposal. (App. 363).

Respondents also propose that the following sentence be added to Petitioner's statement of the case: The

trial court determined that the advisory jury's verdict "was against the clear weight of the evidence" (Pet. A-35), and the Court of Appeals reinforced this determination (Pet. A-8 and A-14).

Respondents do not accept Petitioner's recitation of "The Facts" (Pet. 8-16). Respondents' rely on, and incorporate by reference herein, the facts recited by the District Court and the Court of Appeals in the opinions below. (Pet. A-2 through A-43).

REASONS FOR DENYING THE WRIT

This case is not one in which a writ of certiorari should be granted. The Petitioner argues that the question presented is an important question of federal law which has not been settled by this Court. Of course, both the District Court and the Court of Appeals

for the Fourth Circuit determined that Pickering v. Board of Education, 391 U.S. 563 (1968), and Connick v. Myers, 461 U.S. 138 (1983), effectively settled the question that Petitioner claims is unsettled. In Connick, this Court clearly held that weighing the Pickering balance is a matter of law for the court and not a matter of fact for consideration by a jury. 461 U.S. at 148 and 150.

Petitioner also argues that there "is considerable confusion among the federal courts of appeal concerning this issue." (Pet. 23). Although some confusion may be perceived in cases decided before 1983, Connick v. Myers resolved whatever confusion may have existed. Petitioner's reliance on "pre-Connick cases" artificially confuses the issue.

The only post-Connick case cited by the Petitioner as conflicting with the Court of Appeals' determination in the present case is Lewis v. Harrison School District No. 1, 805 F.2d 310 (8th Cir. 1986), cert. denied, ____ S. Ct. ____ (June 1, 1987) (No. 86-1618). Although the Eighth Circuit in Lewis and the Fourth Circuit in the present case apparently disagree on the role to be played by a jury when the Pickering balance is weighed, the apparent disagreement does not warrant granting a writ of certiorari in the present case.

Both the Eighth Circuit in Lewis and the Fourth Circuit in the present case recognized that weighing the Pickering balance is ultimately a question of law for the court to decide. Lewis, 805 F.2d at 315; Joyner, Pet. A-12. In

Lewis, the Eighth Circuit disagreed with the trial court's weighing of the balance in that case, and the Eighth Circuit found evidence to support the jury's determination that the public employee's speech would not create such disharmony in his relationship with his supervisor that the employee would not be able to do his job. However, the Eighth Circuit indicated that the jury's findings need not be followed if they were unsupported by the record. In the present case, the Fourth Circuit agreed with the District Court's weighing of the Pickering balance, and the Court of Appeals agreed with the trial court that the jury's determination was "against the clear weight of the evidence." (Pet. A-8 and A-14).

In both Lewis and the present case, the Courts of Appeals reviewed the evidence considered by the trial courts and the juries in question and reached conclusions about the reasonableness of the findings below. The Petitioner in this case merely seeks another review by this Court. The Petitioner's request would require this Court to conduct a factual review of a lengthy trial record to ascertain whether the record evidence supports the decision of the Fourth Circuit. This Court has previously ruled: "We do not grant certiorari to review evidence and discusss specific facts." United States v. Johnson, 268 U.S. 220, 227 (1925). That the Petitioner seeks a re-determination of the facts in this case is made blatantly clear in pages 45-50 of the Petition, where the

Petitioner outlines his disagreement with the evidence cited by the District Court and the Court of Appeals.

Both the District Court and the Court of Appeals, carefully considered the evidence presented at the trial of the present case and reached the following conclusions: the Pickering balance weighed clearly in favor of the public employer, and the jury's advisory verdict was against the clear weight of the evidence. Thus, even if this Court would grant a writ of certiorari and later rule, contrary to Connick, that juries should play a part in weighing the Pickering balance, the Court would still have to decide again whether that balance tipped in favor of the employer or employee in the present case and whether the jury's verdict was against

the clear weight of the evidence. These determinations have already been made by both the District Court and the Court of Appeals in favor of the Respondents. The Petitioner's attempt to obtain a third judicial opinion should be denied.

CONCLUSION

Therefore, because the Petition for Writ of Certiorari fails to raise arguments that meet the standards for granting certiorari, the Petition should be denied.

Respectfully submitted,

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